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IN THE

Supreme Court of the United States

October Term, 1966

No. 1197

BRYANT-BUCKNER ASSOCIATES, INC.,
Petitioner,

v.

THE DANVILLE TOBACCO ASSOCIATION,
A CORPORATION;
PRODUCERS TOBACCO COMPANY, INC.;
DANVILLE WAREHOUSE COMPANY, INC.;
ET ALS.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PRODUCERS TOBACCO COMPANY, INC. IN OPPOSITION

QUESTIONS PRESENTED

The question presented are:

1. Whether a reasonable diminution of selling time to a newcomer constitutes a restraint of trade in violation of the Sherman Anti-Trust Act or is an unfair trade practice.

2. Are the United States Courts bound as to the law and facts by an advisory opinion given by the staff of the Federal Trade Commission without hearings and which when originally given was erroneous on its face?

3. Can a litigant for the first time in an appellate court attack the appointment of a master made without objection and upon the request or acquiescence of all parties in the absence of fraud or misconduct?

STATEMENT

The Danville Tobacco Association filed a class action, a Petition for Declaratory Judgment, against all the Danville tobacco warehouse firms (10a)*, joining the tobacco speculators and tobacco buyers as class defendants, asking that the District Court determine the reasonableness of a plan, allotting selling time between the various warehouses upon the market. The Producers Tobacco Company, Inc., answered and also filed a Counterclaim and Cross-claim seeking affirmative relief (22a). This pleading contained a careful analysis of the entire problem and was ultimately admitted as evidence (343a). It alleged that the Danville Tobacco Association had allocated selling time by the Floor Space Method since 1948 which had resulted in building wars of unneeded warehouse floor space with no benefit to the farmer or the public. Producers asked that the Court approve a reasonable plan for the allocation of selling time among warehousemen based upon performance.

The District Court appointed a special master with counsel for all parties *agreeing thereto* (54a) and subse-

* Reference to the Joint Appendix filed in the first appeal will be by the page number followed by the letter "a"; reference to the Petitioner's Appendix will be by the number followed by the letter "b"; reference to the Appendix of this brief will be the number followed by the letter "p".

quently entered an Interlocutory Order on June 16, 1962 (382a, 383a), acknowledging the request for general relief relating to the allocation of selling time for 1962 and subsequent years (84a).

The Special Master filed his report on November 29, 1962 (110a) recognizing the chaotic situation existing on the Danville Tobacco Market due to excess of floor space in Danville and approving a Performance Plan. The newcomer under the plan would not be given full credit initially but could acquire full credit by performance in approximately two to three years. On March 6, 1963 the District Court approved this plan (171a) which has become known as the "Danville Plan."

The Danville Tobacco Association is the local Board of Trade in Danville, Virginia, its membership consisting of warehousemen, tobacco buyers and tobacco speculators. Due to various regulations, the market operates only twelve to fourteen weeks (211a) and sells during that period approximately 65,000,000 pounds of leaf tobacco (29a). The selling day is limited to 8800 baskets arrived at by multiplying 5½ (the hours a tobacco buyer works a day) x 400 (the baskets permitted to be sold per hour) x 4 (the number of buyers furnished by each major buying company) (114a).

From 1948 (32a) until 1962 the Danville Tobacco Association allocated selling time on the Floor Space Method, giving no consideration to a warehouse operator's past experience or performance. As a result, literally thousands of square feet of surplus and unneeded (201a) floor space (200a, 368a, 412a) was built on the part of some warehousemen to stay in business (286a, 449a), and on the part of others, to hog the market (36a, 61a, 286a). When one warehouseman would build a warehouse, many others would build simply to gain selling time or hold the

selling time they previously had (286a, 305a, 449a, 452a). In the spring of 1962, Bryant-Buckner joined the Danville Tobacco Association and applied for an allocation of selling time based on a proposed warehouse of 500,000 square feet (188a). Had this request been granted, the new entrant would have been granted about 2200 baskets or 25% of the market, its first year in business (202a) despite the fact that it had done nothing to build-up the market. The Danville Tobacco Association thereupon worked out a new plan for the allocation of selling time, limiting the time granted a new entrant, as well as time allowed an old operator for a new construction, and then filed its request with the District Court to determine the reasonableness of this plan.

Upon the taking of evidence W. N. Terry, Jr., President of the Danville Tobacco Association, and the owner of an individual tobacco warehouses, testified that the market was overbuilt eight times the amount of space needed to efficiently meet the market's needs and the proposed construction by Bryant-Buckner would create a chaotic condition (184a, 223a). This condition was further recognized by the testimony of Mr. Royster, stating that almost half of the tobacco warehouses in a five state area were vacant, having been built simply to gain or keep selling time (285a, 302a). It was clear that if Bryant-Buckner were to build a monstrous warehouse, others would have met the challenge by building equally large unneeded space (194a) which would have led to chaos, with no benefit to the farmer or to the public (196a, 286a, 449a, 450a). The problem is shown when it is borne in mind that the allocation of selling time actually represents the tobacco warehousemen's gross earning power (219a).

C. D. Bryant, Jr., President of Bryant-Buckner, testified that he applied in writing for selling time based on a

warehouse having 500,000 square feet (257a); later testifying that he was compelled by contract to construct 250,000 feet (260a); and still later jumping at the opportunity of constructing only 165,000 square feet (264a). Bryant-Buckner's counsel stated that Bryant-Buckner was compelled to build 265,000 square feet (394a) and that Bryant-Buckner was willing to accept 734 baskets for the year 1962 (366a). Mr. Bryant stated, "The exact size of the building will be 268,792 feet" (418a). This building was never constructed. The allocation of 734 baskets to Bryant-Buckner was made on the assumption that Bryant-Buckner would construct 265,000 square feet (409a).

J. I. Warren, a local tobaccoman testified he owned two large warehouses prior to the 1962 season (268a), and constructed 140,000 square feet, to meet the threat of Bryant-Buckner, to keep what he had (268a).

Fred S. Royster, an expert in the field testified that the Floor Space System was unreasonable and inefficient (292a), that it was the worst system (304a), and was not the best system for the farmer (312a). He recognized the chaotic condition of the Danville Market and referred to the market as being "on the brink" of disaster (305a, 312a, 313a). He recommended the Performance Plan (284a).

Professor Victor C. Heck, *an expert witness presented by Bryant-Buckner,* stated that Bryant-Buckner should be limited as a new entrant to the market to the "break-even point" which might be from 75% to 90% (317a). Other evidence showed this break-even point to be 5% of the selling time or 440 baskets (224a). Further evidence indicated the break-even point to be around 7% or 616 baskets (67a). (Bryant-Buckner actually received 724 baskets under the plan adopted by the District Court). This witness also endorsed the Performance Plan (318a).

Jack W. Garrett, manager and part owner of Producers, testified under adverse examination by counsel for Bryant-Buckner. Mr. Garrett stated that Producers had to build a new warehouse in 1952 to survive and stay in business (449a), having been driven off the Fairmont, North Carolina, market by the uncontrolled building brought on by the Floor Space System. This was after having been in business on that market for twenty-three years (450a). The other small warehouses, Virginia-Carolina, also had to build simply to survive (452a). Mr. Garrett testified that Producers had always fought the Floor Space System (454a). A large part of Mr. Garrett's testimony was incorporated in Producers pleadings (22a), and the suggested plan for 1962 and the Memorandum in support thereof (60a) were duly admitted in evidence (343a).

It was upon this status of the record that the order of March 6, 1963 was entered, an appeal taken and the decision of the Circuit Court rendered.

Subsequently, the Federal Trade Commission filed a report which contained obvious errors and was difficult to understand (9p, 10p). The District requested a supplemental report, which was filed in due course. All parties were given the opportunity to file exceptions to the report. The District Court then heard the several matters on September 23, 1965, November 1, 1965 and January 21, 1966. The matter was taken under advisement and the Court's decision rendered February 9, 1966.

The petitioner while opposing the Plan on the one hand, applied for an increase in selling time for the 1965 season based on its performance in 1964. Although the application was filed months later than the Association's rules required (1p), the petitioner insisted that it be granted an increase. The District Court, to accommodate the petitioner, suggested that the Association audit the books of

the petitioner to determine if it were entitled to an increase.

The Sales Committee of the Association spent several days attempting to audit the petitioner's books, only to discover that the most necessary records, the basket tickets, were missing. The petitioner had no explanation for the missing records and refused to produce them (1p). It is well known in the industry that these tickets are essential to a valid audit for they are the only receipts endorsed by all parties including the government grader. On the basis of the missing records, the Association refused to grant petitioner an increase for 1965.

Producers filed a petition on June 11, 1965 requesting the District Court to approve the same selling schedule for 1965 that was used in 1962, 1963 and 1964 (11p).

The Special Master filed his second report on December 1, 1965, recommending as the permanent Plan, the Plan which had been used since 1962. The District Court heard the matter *ore tenus* on January 21, 1966, and at the conclusion took the matter under advisement. Its order approving the permanent Plan was entered on February 9, 1966. From this order an appeal was taken by the petitioner and on January 25, 1967, the United States Court of Appeals For the Fourth Circuit affirmed the District Court's action.

REASONS FOR DENYING THE WRIT

General Law On The Question Involved

1. WHETHER A REASONABLE DIMINUTION OF SELLING TIME TO A NEWCOMER CONSTITUTES A RESTRAINT OF TRADE IN VIOLATION OF THE SHERMAN ANTI-TRUST ACT OR IS AN UNFAIR TRADE PRACTICE.

The point raised as to a reasonable diminution of selling time to a newcomer has been repeatedly decided and is not

novel. Certainly, the theme of the decisions of the Court in *Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 263 F. 2d 502, 511 (4th Cir. 1959) and *Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 294 F. 2d 619, 629 (4 Cir. 1961), is that a plan which provides a reasonable vehicle for the new entrant to compete is acceptable although there is some diminution to a newcomer. These decisions were based upon the decisions of this Court, and as will be shown later, with particular reliance upon the decision of this Court in *Federal Communications Commission* v. *R.C.A. Communications, Inc.*, 346 U.S. 86, 91, 92, 73 S. Ct. 998, 97 L. Ed. 1470, and the concurring opinion of Justice Frankfurter in *Associated Press* v. *United States*, 326 U.S. 1, 27, 65 S. Ct. 1416, 89, L. Ed. 2013. Further, the United States Court of Appeals for the Fifth Circuit applied the same principles in *Rogers* v. *Douglas Tobacco Board of Trade*, 244, F. 2d 471, 479.

The hope of the petitioner is based upon the opinion of the Federal Trade Commission, referred to as the FTC, which was filed in this matter. Basically, it may be said that the crux of the disagreement of the FTC with the plan adopted, which has become known as the "Danville Plan," is that the FTC wanted to give to the new entrant 100% for the first unit of space. If this view were accepted, it would mean that merely by building a warehouse of approximately 87,500 square feet a new entrant could enter the market on a 100% parity with existing warehousemen. This position completely overlooks the very nature of a "tobacco market" and is inconsistent with the petitioner's own expert witness who testified the new entrant should only be given enough of the market to "break-even" (317a).

A "tobacco market" is defined by Professor Clyde C. Carter in his research paper upon "State Regulation of the

Marketing of Leaf Tobacco" (1961), (Exhibit 13) at page 4, as "* * * every community with one or more warehouses where leaf tobacco is sold at auction." Thus, a "tobacco market" is something tangible created by the investment of persons in facilities to create such market and the good will instilled in the farmers and buyers by advertisement and service. The Special Master's report pointed out that tobacco associations and individual tobacco warehousemen are instrumental in advertising and creating the atmosphere which is inducive to the farmer to bring his tobacco to that market for sale and to the buyers to buy at that market. The competition between tobacco markets has always been severe. A farmer in the Danville area may very well go to the South Boston, South Hill, Lawrenceville or various markets in North Carolina if he finds them more attractive. Thus, the creation of the market as well as the maintenance of the market are both important items.

The Circuit Court of Appeals in its decision in *Asheville Tobacco Board of Trade, Inc.* v. *FTC, supra,* stated (at page 511 of the Federal Reporter):

> "The Commission does not disapprove of the adoption of a performance system, as opposed to a floor space system or other method of allocating selling time. When a performance system is used, it is necessary to adopt some sort of new warehouse provision and arguments suggest themselves for and against any type of new warehouse provision which might be adopted. On the one hand, the prevention of overbuilding and building warehouses is a legitimate objective; on the other hand, the owners of existing warehouses should not be allowed to prevent the construction of desirable new facilities. The controlling principles, as stated by the Supreme Court in *Federal Communications Commission* v. *R.C.A. Communica-*

tions, Inc., 346 U.S. 86, 91, 92, 73 S. Ct. 998, 97 L. Ed. 1470, and in the concurring opinion of Mr. Justice Frankfurter in *Associated Press* v. *United States*, 326 U.S. 1, 27, 65 S. Ct. 1416, 89 L. Ed. 2013, were quoted and applied by the Fifth Circuit in *Rogers* v. *Douglas Tobacco Board of Trade*, 244 F. 2d at page 479. Competition is not an absolute. Every restraint of trade is not a violation of the antitrust laws; the decisive question is whether it is an unreasonable restraint, and this depends on the significance of the restraint in relation to the particular market under investigation."

The adjustment between the old warehousemen and the new entrant involves the acquiring of baskets by the new entrant and the taking from the old operator a part of what he had. Thus, the new entrant receives a transfer from the old operators of a part of the creation and good will of the market existing before his application; thus, in all fairness there must be some reasonable diminution but such as would not deter the full opportunity to compete and pass the old operators within a reasonable time. This is what the Danville Plan accomplishes for within three years the new entrant may surpass the old operator upon performance.

2. ARE THE UNITED STATES COURTS BOUND AS TO THE LAW AND FACTS BY AN ADVISORY OPINION GIVEN BY THE STAFF OF THE FEDERAL TRADE COMISSION WITHOUT HEARINGS AND WHICH WHEN ORIGINALLY GIVEN WAS ERRONEOUS ON ITS FACE?

The decision previously quoted referred to the market "under investigation." This term is of interest because the position of the petitioner is apparently that the United

States Courts do not have the power to decide but must accept the report of the Federal Trade Commission as a matter of law upon the issues presented. Certainly, the statutes cited give no clue to a surrender of the said Courts' jurisdiction to hear and decide violations of the Anti-Trust laws.

A review of the situation apparent to the District Court is important. The record will disclose no evidence taken by the FTC to support its findings or conclusions as to the Danville Market. It is not our purpose to make a general attack upon the Commission but we do feel compelled to point out the inadequacy of the investigation and to observe that the report apparently was written with burley markets in mind, such as the Asheville Market, where additional space may be desirable. So far as we know, only the petitioner was interviewed in Washington. We have heard that one person in Danville received a telephone call from a representative of the FTC but this respondent never so much as received any notice of any hearing (nor had any opportunity to present its views) despite the fact that it had vigorously opposed the Danville Tobacco Association in the District Court and Appeals Court in the first appeal and was instrumental in creating the Danville Plan which was ultimately adopted. There was no investigation so far as we can ascertain. Nor did the petitioner make any effort to schedule a hearing before the District Court to present evidence which would substantiate the repeated claims made by it. Yet it supports a report which makes no distinction between the Boone Market, a burley market where the commodity is not perishable, and the Danville and Fuquay-Varina Markets which are perishable markets with entirely different space requirements.

Despite this lack of any investigation, the Commission recommended a plan which would give a new entrant 100%

credit for his unit of space if he elected to build a warehouse of 87,500 square feet. It did not recommend 80, 85, 90 or 95% credit but a full 100%. Nor did it recognize that when the new entrant receives his allotment, it must be deducted from the old warehouseman's allotment and thus reducing the old warehouseman's allotment for his first unit. This recommendation is made when the new entrant had neither created, built, nor maintained the market of which he claims a part by merely building a warehouse, wholly owned by him, and with which he seeks to compete with those who did create, build and maintain such market. We do not wish to create the impression we begrudge competition, for Producers has steadfastly fought for a performance plan. However, the new entrant should not be given the competitive advantage of a whole slice of the pie with no diminution to offset the investments in advertisements and creation of good will for the market when others have already expended their funds and efforts to create such market.

We do say that the test must be the "reasonable test." The diminution must be reasonable and if it is claimed that the plan is not reasonable, evidence must be secured by qualified persons to show why it is not. The new entrant must be given an opportunity to compete fairly, but we support the position that 75% is reasonable. Very few businesses are opened in which the new entrant is guaranteed that he will have a ratio of 75% of the customers of his competitors the first year upon the mere construction of his facility. Indeed very few new businesses can expect that they can through performance be on a par within three years (8% increase per year by performance) with their finest competitor. The absurdity of the petitioner's statements as to competitive positions of old and new warehouses is seen when it compares the 724 baskets allotted

the petitioner, its first year in the market, and the 785 baskets allotted this respondent after fifty years in the market.

The results of the adoption of the Plan as formulated by the FTC would be disastrous to the farmer as well as the market. Immediately, a number of one unit size warehouses would be built with demands for a 100% credit for each. The entire market would be thrown into financial chaos with the stability of the service to the farmer being sacrificed by speculators who will construct one unit warehouses and immediately reap a harvest of 100% of the market per unit. The farmer must sell his product and accordingly, he can either go to a competing market or deal with such speculators who are forced upon him.

The Circuit Court of Appeals in its first opinion in this matter noted that experts for both sides recognize the rightfulness of a diminution to a newcomer. This fact being established by experts for both sides and having the past approval of the Courts, no reason for adopting the unsupported position of the FTC has been shown.

It may shock this Court to know that the adoption of the FTC Plan would result in an immediate increase in the number of baskets allotted to this respondent. However, the ultimate result upon the market would be so disastrous to the general welfare of the market that this respondent cannot in good conscience support such a plan.

3. Can a Litigant for the First Time in an Appellate Court Attack the Appointment of a Master Made Without Objection and Upon the Request or Acquiescence of All Parties in the Absence of Fraud or Misconduct?

Reference to the record will disclose that the order of the District Court of May 12, 1962 (54a) recites that all

parties agreed to the appointment of the Master. Further it is conceded by the petitioner that no objection was made. There is no charge of fraud or misconduct. In regard to the Master's reports no error is pointed out and actually the entire record, including the petitioner's witness, supports his position. Indeed, in those cases where the appointment is questioned some basis for attack has been shown.

Probably this position of the petitioner is best answered by Justice Bryan in his first opinion where he stated (A14b):

> "The aspersions deliberately directed at the master in the briefs of Bryant-Buckner's counsel, attempting to impugn his motives, and the disparaging references to the trial judge, are entirely unfounded. We deplore such tactics and condemn them."

The petitioner has failed to set forth a case which should be reviewed because:

1. The plan adopted has proven to be a fair vehicle for the entrance into the market of newcomers. Further, *it provides for competition* with a potential of an 8% annual growth based upon performance. There has been shown no exclusion from the market or any substantial part of the market. Indeed, the petitioner is on a practical par with this respondent on the market and with full opportunity to increase annually on the same basis as all other warehousemen. Counsel realizes that there has not been an extensive discussion of authorities, but no conflict between the Circuit Courts of Appeal has been shown; nor have any cases in point which conflict with the decision of the Court of Appeals for the Fourth Circuit in this matter been cited by petitioner.

2. The only conflict between the FTC plan and the one adopted was the long established doctrine of reasonable diminution and what is reasonable becomes a question of fact. It is also clear that the FTC report was not based upon evidence or as a result of hearings and conflicted with the opinion of the expert presented by the petitioner upon the taking of the evidence.

3. The claim of Bryant-Buckner that it is in a less favorable position than under a floor space plan is attributable to its failure to show that it has performed so as to be entitled to an increase. The petitioner failed to produce the records required to show that its performance warranted an increase (1p).

4. The claim that the case should be reviewed because a special master was appointed who was experienced in the field and had many contacts in the field, falls of its own weight when it is realized that he did not decide the issues but the issues were decided by the District Court after hearing experts for both sides.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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PROCEEDINGS OF SEPTEMBER 23, 1965

[TR. P. 12]

MR. MEADE: If it please the Court, the situation is this: As we have already stated, as far as 1964 is concerned, that is over with, that is, the allocation of 1964. Everybody agreed to it. Everybody operated under it. Everybody was happy with it. In March, the second Tuesday in March, 1965, a Sales Committee meeting was held after due notice. Bryant-Buckner was represented at that meeting. No application was made for any additional selling time. That is the time at which any warehouseman who wants an increase in allocation of selling time makes it known and requests it. [TR. P. 13]

Now at that meeting on the second Tuesday in March, 1965, no such request was made by Bryant-Buckner. The meeting was held and the minutes show for themselves the action taken by the Sales Committee.

PROCEEDINGS OF NOVEMBER 1, 1965

[TR. P. 17]

MR. GARRETT: Your Honor please, I would like to get one thing in right here.

Mr. Biggs was not present at the other meeting, and I don't know how he is communicating with his client, but the committee found that the Bryant-Buckner basket tickets had been destroyed, so that his record—it was absolutely impossible for anyone to go in there and determine. Why they destroyed them, we don't know, but the committee found that they were destroyed.

Now if he doesn't know this fact, I think he should communicate with his client, and I wonder if the position is well taken this morning.

MR. BIGGS: I didn't want to get into that, Your Honor,* * *

[TR. PP. 80-82]

Q In other words, what you are saying, Mr. Lea, is that if the FTC Report as regards the allocation of selling time is adopted, then it would be your view that the old members of the market here should modify their existing rules about withdrawals, leases, transfers and mergers. Is that correct?

A No, sir.

Q And you say that if these provisions are adequately enforced so that only bona fide new entrants could come onto the market it would give you adequate protection?

A I would think—This is just my own idea, but I would think certainly that you could dissolve a partnership, and if you were completely disassociated with one another, I think it would be two firms.

Q In other words, if this is not the case, then you misunderstand the rules as they are presntly written. Is that correct?

MR. MEADE: Your Honor please, I object to the question.

MR. WHEATLEY: Object to the form of the question.

MR. MEADE: It is a legal question and it is argument, and I think it is improper.

MR. BIGGS: The thing that my examination is directed to, Your Honor, is that the rules are written in the record, and his evidence that this will tragically affect his partnership may very well be based on a misunderstanding of those rules.

MR. GARRETT: Your Honor please, the rule that he is quoting is directly from the "Royster Plan" rather than from the regulation of the Danville Tobacco Association, and he is, I believe, trying to mislead this witness.

MR. BIGGS: No, it is my understanding that these rules were adopted—

MR. GARRETT: Aren't these rules that you are quoting from the "Royster Plan" which you seem to be attacking?

MR. BIGGS: These rules are part of the regulations of this market, Mr. Garrett.

MR. GARRETT: Which are a part of the "Royster Plan," aren't they, Mr. Biggs?

MR. BIGGS: Yes, they are. There is no question about that.

MR. GARRETT: All right, sir.

MR. BIGGS: They are part of the present regulations of this market.

MR. GARRETT: I think that contradicts your position.

MR. BIGGS: I don't think it does in any way, sir.

THE COURT: All right, anything further?

EXCEPTIONS

Producers Tobacco Company, Incorporated, by counsel, objects and excepts to the advisory report of the Federal Trade Commission as filed in the Clerk's Office of the United States District Court at Danville, Virginia, on May 14, 1965, for the following reasons:

1. The advisory report of the Federal Trade Commission failed to follow the directives of the Fourth Circuit Court of Appeals in its opinion rendered on May 14, 1964, by which the Fourth Circuit Court of Appeals remanded this case with directives to the District Court to refer the permanent plan to the Federal Trade Commission, request-

ing it to investigate and advise the District Court upon the validity of the proposed plan or to prescribe an appropriate plan, in that it arbitrarily, and without authority to do so, consolidated this case with the other cases in North Carolina mentioned in its report, along with other cases pending before the Federal Trade Commission, and not involved in litigation, when the facts involved in the other litigations and the other cases initiated before the Federal Trade Commission were entirely different, and not applicable to the Danville situation. The report in handling the problems of two flue-cured and one burley market in a single advisory report ignored the vast differences between flue-cured and burley tobacco markets. The record in this case shows that tobacco offered for sale on a flue-cured market is highly perishable and must be sold promptly, whereas burley tobacco will remain in a non-perishable status indefinitely. The difference, of course, is the fact that tobacco in the Danville market area is flue-cured, or cured by heat, whereas burley tobacco is air-cured. The record further showed that flue-cured farmers prefer to sell their tobacco not later than one day after delivery to the tobacco warehouse, whereas burley farmers prefer to deliver their tobacco to the tobacco warehouse and to fill all available floor space as soon as the warehousemen will receive it. It is, therefore, obvious that the wishes and best interests of the burley farmers require far more floor space on a burley market than the wishes and best interests of farmers on a comparable basis on a flue-cured market. The report of the Federal Trade Commission constitutes better advice for an appropriate plan on a burley market rather than on the Danville flue-cured market.

Further, consideration should have been given by the Federal Trade Commission to the evidence in this case that

the selling season on the Danville tobacco market has consistently grown smaller from year to year. For example, the selling season formerly was September 1st to the following March 1st but has consistently been curtailed so that during the regular sales season of 1964, there were only 49 days of selling time. The record will show that of these 49 days of selling time during the 1964 sales season on the Danville tobacco market, there were 33 days with 8800 baskets for sale, 4 days with from 7920 to 8900 baskets for sale, 1 day with 7747 baskets for sale, and only 11 days with less. The Danville tobacco market was blocked 67.35% of the time and the market was 85% full for 75.5% of the time. These figures clearly illustrate the vast differences between selling tobacco in the Danville area and selling tobacco in a burley area.

2. The report of the Federal Trade Commission, in advising the District Court that a new entrant to any market, including the Danville market, be allowed the same allocation of selling time as that given to old warehousemen for each unit of their warehouses as already established on the market, without any restriction or limitation on the new entrant, failed to follow the directive of the Fourth Circuit Court of Appeals in its said opinion in which it sanctioned a less-than-average-time allowance to a fresh entrant, and in doing so it is now advising the District Court to overrule the Fourth Circuit Court of Appeals, when the Fourth Circuit Court of Appeals stated in its said opinion that the present suit's very object was to tailor floor space to a reasonable pattern coming within the anti-trust statutes.

3. The report of the Federal Trade Commission, which was directed by the Fourth Circuit Court of Appeals to investigate the permanent plan in question, and to advise

the Court upon the validity of the proposed plan, or to prescribe an appropriate plan, failed to do either, simply being an arbitrary and bureacratic treatise foreign to the directives of the Fourth Circuit Court of Appeals, it being apparent from the report that the Federal Trade Commission was attempting to act in a judicial capacity, rather than in an administrative or investigative capacity, as indicated. The Federal Trade Commission before handing down its report held no hearings, took no new evidence, and gave the participants in this litigation no opportunity of explaining the differences between a flue-cured and a burley market, or to show or present evidence proving their contentions, factually or otherwise. The report failed to consider, much less give any credit to the old warehousemen for their expenditure of vast sums of money and effort over many years for the establishment of goodwill and the other factors creating and resulting in a going and successful to-build an already overbuilt tobacco market, the apparent bacco market.

4. The report of the Federal Trade Commission under its conclusions and recommendations on page 16 thereof, condemns the old warehousemen for the admitted overbuilding of the Danville market and thereafter adds insult to injury by advising the District Court to go back to the condemned floor space method and open the market wide open for any and all new entrants to come in and over-effort by the Federal Trade Commission having been to establish a system giving no credit to the old warehousemen for the establishment of a going and successful tobacco market, but giving full opportunity for any and all new entrants coming into the market in an apparent attempt to emphasize competition on an unlimited basis on the floor space plan which, as stated, has already been con-

demned and denounced as unfair and unsuitable to this or any other market.

The suggested plan, if any, of the Federal Trade Commission would cause the following:

An operator whose holdings were 0 three years ago, would get 135% of his present selling time, whereas one who has expended over 400% in the past 15 years would get 102%. One who has been on the market for over 75 years, and who has lost ¾ths of its selling time by not expanding at all, would get only 84%.

The report of the Federal Trade Commission alleges that its suggested plan, if a plan, would treat all operators, both old and new, alike, but this is what it would actually do:

If a new operator should build a house of 87,500 square feet, he would get 542 piles per day, whereas for the same house the smallest present operator would get only 317 piles, and the largest operator would get 136 piles.

Obviously, this so-called plan of the Federal Trade Commission would leave all old and established operators with only one way to go, that is down, with a consistent and constant loss of selling time from year to year.

Since the proposal of the Federal Trade Commission would allow any new entrant much more selling time according to floor space than any present operator now has, it would actually encourage and invite the disaster this present suit was designed to prevent, that is ruinous overexpansion of the Danville tobacco market. It is self-evident that the so-called proposed plan of the Federal Trade Commission would be even worse than the straight, or old floor space plan which has long since proved itself ineffective, and which the United States Fourth Circuit Court of Appeals has described as being "menacing."

5. The report of the Federal Trade Commission failed to recognize the need for a performance plan, or experience system, as already approved by the Fourth Circuit Court of Appeals, and constitutes an ill-advised suggestion to the District Court to adopt a mere space plan designed solely to facilitate and insure ease of entry into the market by any and all new entrants. This, in effect, ignores the holding of the Fourth Circuit Court of Appeals that dividends of selling time in a tobacco market can not be set apart with precision, and the admission by the Fourth Circuit Court of Appeals that a just tolerance is permissible and that it is right for there to be a diminution of selling time to a new entrant.

6. The report of the Federal Trade Commission states judicially that no present operator has a vested interest or other property right in the allocation of selling time, which is denied, since an old warehouseman does have some interest and does have some property rights which should be considered and which were considered reasonable by the Fourth Circuit Court of Appeals. The report fails to take into consideration the right of an old and established warehouseman to get due and fair consideration for participation over many, many years in the establishment of a going and successful tobacco market.

7. The report of the Federal Trade Commission in essence rejects the proposed Danville plan which the Fourth Circuit Court of Appeals has already held to be innocent of anti-trust guilt, the Court finding no unjust combination, conspiracy or monopoly, and the Court further finding that the plan represented an effort on the part of the Board of Trade to put in force an equitable adjustment among all of the warehousemen, both old warehousemen and new entrants, all of the constants of supply, selling time and buyers, all of which had been lawfully fixed.

8. The report of the Federal Trade Commission which calls for credit for the first full unit to established operators, as well as to new entrants, fails to give due consideration or credit to the old warehousemen for the establishment of a going and successful tobacco market, which is contrary to the holding of the Fourth Circuit Court of Appeals in this and other cases.

9. The report of the Federal Trade Commission is simply a suggestion to the District Court for the re-establishment of the old and impossible floor space plan, which is unrealistic, as well as impossible in performance, and failed to show the invalidity of the Danville plan or to prescribe any other appropriate plan other than, as stated, a going back to the old floor space plan, which would inevitably result in further and greater overbuilding of the existing market. In essence, the suggested plan of the Federal Trade Commission would have the District Court to order a return to a system which the Fourth Circuit Court of Appeals has held to have serious defects but none more menacing than the increase of floor space not to meet a need but to enlarge a warehouse's proportion of selling time, which would be contrary to the best interests of the farmers of this area.

10. The report of the Federal Trade Commission was not factually correct. In addition to ignoring the part that Producers Tobacco Company, Incorporated, and all the old operators played in building up the existing Danville tobacco market, the report stated that in 1950 there were 6 firms having 12 warehouses, whereas there were 7 firms having 18 warehouses, and referred to a total space of 908,323 square feet, whereas there were 954,134 square feet. The report on line 4, second paragraph, page 5, referred to B-B, a new entrant, as having applied for 400,000 square feet of space, whereas the opinion of the Fourth

Circuit Court of Appeals showed that it had applied for 500,000 square feet. The last sentence on page 5 of the report stated that Motley had been granted full time on the basis of the then existing floor space system, whereas Motley was cut by 10%. On page 17, lines 10 and 11, the report stated that old members kept all credit for all old space, which was erroneous, the old warehousemen losing selling time every time a new entrant came into the market.

11. The whole report of the Federal Trade Commission shows an apparent leaning to and prejudice for the new entrant; B-B, as well as for any and all future entrants at the expense of the old and established warehousemen in the Danville market. If the Federal Trade Commission were in fact a marriage counseling agency, it would seem that it would concern itself only with the problems of the brides, failing to realize that a new entrant changes its category after the marriage has been consummated, and thereafter the new entrant automatically becomes an old warehouseman.

12. The report of the Federal Trade Commission is designed, whether purposely or not, to destroy the public auction system of selling tobacco. The proposed plan of the Federal Trade Commission would inevitably result in such chaotic conditions for the private enterprise of selling tobacco at public auction that the system would be taken over by the government in the form of a governmental monopoly, such as that in existence in Great Britain, in Japan, and in other countries. If this is the ultimate purpose of the proposed plan of the Federal Trade Commission, then Producers Tobacco Company, Incorporated, will be the first to concede that such would follow from the adoption by this Court.

13. In the opinion of the Fourth Circuit Court of Appeals, it was stated that Producer's was appealing on the ground that the Danville plan would not provide adequate protection against improper tactics of members, and would not give a member credit for past performances, thereafter holding that the general fairness of the plan was not an analysis appropriate for the Court. The proposed plan of the Federal Trade Commission does not make any suggestion, fair or otherwise, as to these matters, the report obviously ignoring another of the directives of the Fourth Circuit Court of Appeals. These matters relate to the contentions of Producers Tobacco Company, Incorporated, that V-C and Producers, the smallest firms, should have been allocated more selling time under the Danville plan as originally adopted. By the fair inferences from the opinion of the Fourth Circuit Court of Appeals, it was desired that the Fedral Trade Commission should concern itself with these problems and to investigate and advise the District Court accordingly. This the Federal Trade Commission did not undertake to do. It is apparently clear that the Federal Trade Commission was not interested in any manner in the problems and welfare of the small, but old and established warehousemen, whereas in truth it is evident that its interest was entirely for any and all new entrants, having no concern for any old and established warehousemen, whether small or large.

PETITION

Producers Tobacco Company, Incorporated, by counsel, hereby petitions the Court to approve and order into effect for the 1965 sales season the same selling schedule as that approved and ordered for the 1962-1963-1964 selling seasons, the same to be temporary, so as to permit the orderly operation of the Danville tobacco market for the 1965 sell-

ing season, and in order to give this Court and all parties concerned reasonable time in which to consider said report of said Federal Trade Commission, to more fully object and except from the proposals therein contained, and so as to give this Court reasonable time in which to formulate and approve a permanent plan for the Danville tobacco market in keeping with the decision of the United States Fourth Circuit Court of Appeals as decided on May 14, 1964, the said Producers Tobacco Company, Incorporated, praying for the entry of an order protecting it and all other parties concerned from any taint of unreasonable restraint pending the approval and adoption of said permanent plan, and the said Producers Tobacco Company, Incorporated, further praying that the report of the said Federal Trade Commission be rejected *in toto* in so far as it deviated from the plain and explicit directives of said opinion of said Fourth Circuit Court of Appeals.

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